PRIVY COUNCIL.

NANOMI BABUASIN AND OTHERS (PLAINTIFFS) *v.* MODHUN MOHUN AND OTHERS (DEFENDANTS.)

P. C.* 1885 *June* 24 *and* 30, *July* 1, *and December* 1.

[On appeal from the High Court at Calcutta.]

Hindu Law—Alienation by Father—Mitakshara and Mithila Law—Execution of decree—Sale of ancestral estate in satisfaction of father's debt—Liability of sons' shares—Parties to proceedings.

There is no conflict of authority as to the principle that sons cannot set up their rights, which are to take present vested interests, on their birth, jointly with their father in ancestral estate, against their father's alienation for an antecedent debt, or against his creditors' remedies for his debt, if such debt has not been contracted for an immoral purpose; the law on this point being the same under the Mitakshara and the Mithila shasters.

From the above must be distinguished the question how far the joint sons can be precluded from disputing the liability attaching to their shares, where proceedings have been taken by, or against, the father alone.

If the father's debt, not having been contracted for an immoral purpose, is such as to support a sale of the entirety of the joint estate, either he may sell the latter without suit, or the creditor may obtain a sale of it by suit. But the joint sons, not being parties to the execution proceedings or to the sale, are not precluded from having a question as to the nature of the debt tried in a suit of their own; a right which will, however, avail them nothing unless it can be shown that the debt was not such as to justify a sale of the joint estate.

If, upon the proceedings and in regard to the intention of the parties, doubts are raised whether what has been sold is the interest of the father alone, or the joint estate, the absence of the sons from the proceedings may be a material consideration. But, if the purchaser has bargained and paid for the entirety, he may defend his title upon any ground which would have justified a sale, had the sons been brought in to defend their interests in the execution proceedings.

Deendyal v. *Jugdeep Narain Singh* (1) does not lay down as an invariable rule that co-parcenary interests will not pass by an execution sale unless the co-parceners are joined in the suit, or that only the father's interest passes to the purchaser where the suit was against the father alone.

This debt being one which must be taken as a joint family debt, though the suit upon it was against the father alone, *held*, that a claim by minor sons for exemption of their shares failed on the merits, the entire family estate having passed by the sale.

* *Present:* LORD MONKSWELL, LORD HOBHOUSE, SIR B. PEACOCK, AND SIR R. COUCH.

(1) L. R. 4 I. A., 247; I. L. R. 3 Calc., 198.

1885

NANOMI BABUASIN v. MODHUN MOHUN.

APPEAL from a decree (16th June 1882) of the High Court, reversing a decree (14th May 1879) of the Subordinate Judge of Bhagulpur.

The question raised on this appeal was whether the entirety of a family estate, including the shares of minor sons, who were jointly interested in it with their father, had passed to a purchaser at a sale in execution of a decree obtained against the father alone, the minors not having been represented in the suit, nor in the execution proceedings.

Kirat Singh, who died in 1858, gave shares in his estate, Mouzah Lalpur Bhatkera in Tirhut, to his two sons, one of whom was Girdhari Singh, the father of the two minor plaintiffs in this suit, now the appellants. Litigation between the brothers resulted in a decree, whereby Girdhari Singh obtained an eight annas 11¼ gundas share of the mouzah.

The minor sons of Girdhari were both born before November 1864, in which year, having borrowed Rs. 45,000 from one A. Christian, he executed leases of the above share of the mouzah to H. Collis, son-in-law of his creditor, for repayment of that sum, as advanced zar-i-peshgi. On the death of Collis occurring in 1869, and the leases passing to the widow of the latter, Girdhari Singh dispossessed her.

Bringing a suit against him, the widow obtained a decree (10th April 1871) for possession with mesne profits, interest and costs; and in satisfaction of the money also decreed, now amounting to Rs. 51,767, obtained an order (15th January 1872) for the sale of the eight annas 11¼ gundas share of Lalpur Bhatkera. It was accordingly sold to Hardinarain, now represented by the respondent, Modhun Mohun, and the sale was confirmed in April 1872 by the District Court of Bhagulpur. Girdhari Singh in vain attempted to get this sale set aside, it being in the end upheld by order of Her Majesty in Council (19th May 1876).

The present suit (14th September 1878) was brought on behalf of Girdhari's minor sons by their mother, and afterwards by leave on her own behalf also, against the purchaser and Girdhari Singh, on the ground that the eight annas 11¼ gundas share being ancestral property had not been sold under such circumstances as to deprive the plaintiffs of their shares. They claimed that the

interest of Girdhari Singh alone passed by the sale, and that, on their shares being ascertained by partition, they should have them; Nanomi Babuasin, the mother, being entitled to one-fourth, and three-fourths being divisible between the minors on the one hand, and the auction-purchaser on the other.

The principal defence, which was that by the sale of 1872 the entirety of the family estate passed to the purchaser, raised the question disposed of on this appeal.

Upon other issues, the Subordinate Judge having found that Nanomi Babuasin had a money provision made for her at her marriage by her father-in-law, held that she was disentitled, under the law of Mithila, to a share on the partition of the family estate; and he was of opinion that the father was entitled to a double share. But on the principal question, he decided that the decree of 10th April 1871 did not extend over, or bind, the entirety of the joint property, the members of the family entitled to shares in it not having been made defendants in the suit, or parties to the decree, along with Girdhari Singh, whose share alone was liable for the debt.

The judgment of the Court of first instance as to this part of the case was reversed by a Divisional Bench of the High Court (CUNNINGHAM and PRINSEP, JJ.) The above decision as to the shares of Nanomi Babuasin and of Girdhari Singh was approved by the Appellate Court; but in regard to its judgment on the principal point, *viz.*, that the entire family estate passed by the sale of 1872, it became unnecessary to decide those subordinate questions.

That part of the judgment of the senior Judge of the Bench, CUNNINGHAM, J., which related to the principal point, was as follows:—

"In the first place, then, what did the auction sale purport to convey to the purchaser? The decree in this case was for restoration to the plaintiff of the possession to which she was entitled under the lease, and for payment of mesne profits. It did not affect any specific portion of the estate, and in this respect the present case differs from those in which a specific portion of the estate having been mortgaged a decree was given for its sale, and no question as to the actual property sold could arise. This being

1885

NANOMI BABUASIN v. MODHUN MOHUN.

so, we have next to look to what the language of the sale-proceedings expresses to be the subject of the sale. In the petition for execution an inventory of the judgment-debtor's property was given, which described it as 'the share of eight annas 11¼ gundas out of the entire 16 annas, the right and interest of the judgment-debtor in Mouzah Rampur Bhatkera, bearing a jumma of Rs. 8,106-11,' and prayed that this might be attached and sold. The proceeding confirming the sale and the certificate of sale produced at the hearing of the appeal, are to the same effect, *viz.*, describing the property as 8 annas 11¼ gundas share, and stating it to be the right and interest of the judgment-debtor in the whole estate. This language might be regarded as specifically stating the object of the sale, *viz.*, an 8 annas 11¼ gundas share in the 16 annas, and the statement as to its being the right and interest of the judgment-debtor as mere description. Section 249 of the Civil Procedure Code, however, provides that the proclamation of sale shall declare that the sale extends only to the right, title and interest of the judgment-debtor in the property specified; and it may be contended that, read in the light of this section, this was the proper meaning of the petition and the certificate. This is the view taken by the original Court. On the other hand, there was much in the character of the previous transactions and the proceedings in the case to justify a more extended meaning. The action was one against the father and manager for a wrongful act affecting the joint estate, and by which the joint family had benefited. The whole share, and not merely Girdhari's interest in it, had been originally charged with the payment of the instalments and interest in violation of this charge, and it was for the profits wrongfully obtained and presumably enjoyed by the joint family that the suit had been brought and the property put up for sale. The interest of the ostensible owners would not unnaturally be supposed to be identical throughout all the proceedings. Though the sale effected was not on a mortgage decree against specific mortgaged property, it arose out of a charge legally imposed upon specific property, and the unlawful breach by the manager of the terms involved in that charge; and thus a purchaser might reasonably be led to believe that the entire property was being put up to sale. As to this, the original Court

observes: 'The circumstances at the time of sale were such as to impress any person not acquainted with the minor plaintiffs' family, with the belief that the entire share aforesaid was the property of the Babu defendant, and it is very probable that upon such belief the first party defendant made the auction purchase; and when the first party defendant enforced the process of delivery of possession, no one even at that time on the part of the minor plaintiffs or Mussumat plaintiff offered opposition, and the absence of such opposition confirmed the first party defendant in his belief. Hence the first party defendant made a *bond fide* purchase of the entire share of 8 annas 11¼ gundas in the belief that it belonged to the Babu defendant, and entered upon possession, and the minor and Mussumat plaintiffs, by the omission of an act, allowed that belief which was founded on good faith to stand up to the day of institution of this suit.'

"The Judge goes on to arrive at the conclusion that the plaintiffs and their mother believed, at the time of the sale, that the entire 8 annas 11¼ gundas were being sold, and that in fact it is only owing to the new view taken of such proceedings consequent on the decision of the Judicial Committee of the Privy Council in the *case of Deendyal* that the present claim is advanced. The probability that this was so, is greatly increased by the fact, that though the father persistently disputed the validity of the sale, and carried the case up to the Privy Council, he on no occasion took the point that the minors' share of the property was not affected by it. I must, therefore, conclude, that whatever may have been the ambiguities in the language employed, the interest which the Court intended to sell, and which the purchaser and all others concerned believed that he was buying, was the whole 8 annas 11¼ gundas share, of which Girdhari Singh was ostensible owner, and that, as a fact, the purchaser has, under the sale, been put in actual possession of the whole of that share. This being so, I come to consider the claim of the minor sons to set the sale wholly or partially aside. As regards that part of the plaintiffs' prayer which seeks to have the auction sale of the 9th September 1872 set aside, there is no difficulty in deciding that it ought not to be granted. The doubts which formerly existed in Bengal on this point were removed by the decision in *Deendyal*

1885

NANOMI BABUASIN v. MODHUN MOHUN.

v. *Jugdeep Narain Singh* (1), and *Suraj Bunsi* v. *Sheo Pershad Singh* (2), the result of which cases is to affirm that in Bengal, as in the other Presidencies, the undivided interest of a Mitakshara coparcener in the joint property may be sold in execution of a decree against him for his personal debt. It is less easy to dispose of the contention that the sons' share of the estate was not affected by the execution sale. As to this, it has been pressed upon us that we are concluded by the decision in *Deendyal* v. *Jugdeep Narain Singh* from holding that anything more than the right, title and interest of the judgment-debtor passed in the present instance by the sale. I do not, however, consider that this is the necessary legitimate result of that decision. It is true that it was there held that in the circumstances of the case, the judgment-creditor, purchasing at an execution sale under a money decree obtained against a member of a joint family, had acquired only the right, title and interest of the judgment-debtor; and that if he had wished to go further and enforce his debt against the whole family, he ought to have framed his plaint accordingly, and made the co-sharers parties. I think, however, that the observations in that judgment must be read with reference to the circumstances of the case, and not as laying down an invariable rule that in no case will the co-parceners' interest pass in an execution sale unless they are joined in the suit. Such a view would be in direct contradiction of the rule laid down in *Muddun Thakoor* v. *Kantoo Lal* (3) in the Privy Council and the decisions of this Court which have followed that ruling. I think, therefore, that although there may be cases in which the debt is personal to the father, and the father's interest alone is affected by the decree, there are other circumstances in which the father should be presumed to have been acting on behalf of the family, and the decree accordingly to have been one binding on the joint estate, and that in the absence of words to a contrary effect, the execution sale affects the whole property and not merely the judgment-debtor's interest in it. The present case appears

(1) L. R. 4 I. A., 247; I. L. R. 3 Calc., 193.

(2) L. R. 6 I. A., 88; I. L. R. 5 Calc., 148; 4 C. L. R., 226.

(3) L. R., 1 I. A. 321=14 B. L. R., 187.

1885

NANOMI BABUASIN v. MODHUN MOHUN.

to be of this character. The debt was one which *primâ facie* certainly could have been recovered from the sons; the manager was the only ostensible owner, representing the family to the world at large, and it would seem to follow that the interest affected by the execution proceedings should be the interest with which Girdhari Lal was competent to deal, and which was in fact his, so far as liability for his debts, not being immoral, was concerned. Upon the whole, we consider that the sale having been in discharge of the father's antecedent debt, which, accordingly the sons could repudiate only on the ground of its immorality,—the joint family having presumably benefited by the wrongful act which resulted in the decree and execution sale,—the language of the execution proceedings not being inconsistent with the view that the whole estate was sold,—the mistake, if mistake there was, as to the interest passed by the auction sale having been one which the minors' guardian might have prevented and did not prevent, and actual possession of the entire 8 annas 11 gundas having been taken under the sale by the auction-purchaser, we are not now at liberty to set it aside, and declare that the first defendant's possession, so far as the sons' interests are concerned, has been unlawful. We think, that we are bound to follow the rule laid down by the Privy Council in *Ram Sahai* v. *Sheopersad Singh* (1) *viz.*, that, when joint ancestral property has passed out of a family either by a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay such a debt, or in execution of a decree for the father's debt, the sons cannot dispute it except by showing, (1) that the debt was immoral; and (2) that the purchaser had notice of the immorality. This rule was held not to be applicable in that case, and the plaintiffs were allowed to contest the sale on the ground that the purchaser had notice of their claim, but that is not suggested to have been the case in the present instance, and we think that its general principle ought to govern our decision. This view appears to be in accordance with the principles laid down by the Judicial Committee in *Bissessur Lal Sahu* v. *Luchmeswar Singh* (2),

(1) L. R. 6 I. A. 88; I. L. R. 5 Calc., 148; 4. C. L. R., 226.
(2) L. R., 6 I.A., 233.

1885

NANOMI BABUASIN v. MODHUN MOHUN.

and in *General Manager of the Raj Darbhanga* v. *Maharaj Coomar Ramapat Singh* (1) as to the interpretation to be put on execution proceedings, when the wording leaves room for doubt as to the interest which they affect. I think, accordingly, that this appeal must be admitted, and the plaintiffs' suit should be dismissed with costs throughout."

The suit having been dismissed by the decree of the High Court,

On this appeal, Mr. *R. V. Doyne* appeared for the appellants.

Mr. *J. T. Woodroffe* and Mr. *C. W. Arathoon* for the respondents.

Mr. *R. V. Doyne* for the appellants.—The execution sale did not transfer the entirety of the joint family estate, but only the father's right, title, and interest therein. By the father alone was the debt contracted, on which the decree of April 1872, the cause of the execution sale, was obtained; and the appellants, being then in existence, and consequently co-parceners in the family estate (Mitakshara, Chap. 1, s. 5), jointly with their father, were not made co-defendants in the suit, nor were they parties to the proceedings in execution. The result is that, as in *Suraj Bunsi Koer* v. *Sheopersad Singh* (2), the sale is only good as to the share of the judgment-debtor, and does not affect the shares of the other co-parceners. The decree-holder might attach the interest of the father, bring it to sale, and the purchaser could work out his right by means of a partition; see *Deendyal* v. *Jugdeep Narain Singh* (3). It has not, however, been affirmed by the decisions that the family property is available to satisfy the father's creditor, under whatever circumstances, short of immorality as regards the purpose, the debt may have been contracted. It appears that only in cases where the indebted co-sharer has been sued as the representative of the family, has the sale, when purporting to be only of his right, title, and interest, been allowed to convey the interests of the other members of the family; see *Baijun Doobey* v. *Brij Bookun Lal Awasti* (4) and *Deendyal* v. *Jugdeep Narain Singh* (3).

(1) 14 Moore's I. A. 605; 10 B. L. R. 294.

(2) I. L. R., 5 Calc., 148; L. R., 6 I. A., 88.

(3) I. L. R., 3 Calc., 198; L. R., 4 I. A., 247. (4) L. R., 2 I. A., 275.

And with regard to the words of s. 249 of the Code of Civil Procedure, although the 8 annas 11¼ gundas share was specified in the order for sale, only the right, title, and interest of Girdhari Singh therein should have been understood to be sold.

The opinion was intimated in the judgment in *Sadabart Prasad Sahu* v. *Foolbash Koer* (1) that joint property cannot be followed in the hands of co-parceners to whom it may have passed. But this does not hold good where the obligation upon sons to pay their father's debts, upon his death, arises, and conflicts with the right of survivorship. Or, as expressed in *Girdhari Lal* v. *Kantoo Lal* (2), the ancestral estate, upon the death of the father, is not exempted in the hands of the son from liability to pay the father's debt, which it is the son's pious duty to pay; and see *Muttayyan Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (3). But the responsibility of the joint estate seems to have been maintained only where the father as manager, or *karta*, for the family, has charged upon it a debt incurred for the family benefit; or the debt, at all events, is of that character; or where, at the father's death, sons have the pious duty of paying the father's debt out of their shares in the ancestral estate, the father's own share being insufficient to meet it. None of these cases has arisen here. The debt in its inception was the debt of the father alone, he having borrowed money. That the family profited by his acts, such as the ouster which materially added to his debt, has not been made out. The result is that the debt cannot be taken as a family debt, and the only ground on which the judgment of the High Court could be maintained would be that a father contracting debts, however imprudently, provided that his purpose was not immoral, could render liable the shares in ancestral property already vested in his sons. It accords with the decisions that the father's share in such a case should be sold; and that the *onus* should be thrown on the purchaser at an execution sale in satisfaction of a decree against the father, to make due inquiry whether the property specified for sale is so held as to be liable to sale

(1) 3 B. L. R., (F. B.), 31.
(2) L. R., 1 I. A., 321; 14 B. L. R., 187.
(3) L. R., 9 I. A., 128; I. L. R., 6 Mad., 1.

1885

NANOMI BABUASIN' v. MODHUN MOHUN.

in satisfaction of the decree, appears to follow from the application of the principles on which *Hanuman Persad Panday* v. *Babooee Munraj Kooer* (1) was decided.

The appellant's case is strongly supported by the decision in *Deendyal* v. *Jugdeep Narain Singh* (2). There, as here, the proceedings had been taken against the father alone, and there it was held that the purchaser at the execution sale could not have acquired more than the interest of the judgment-debtor; and it was pointed out, in the judgment, that if the creditor had sought to enforce his debt against the co-sharers, who were not parties to the transaction giving rise to the debt, and if he had sufficient basis of claim against them, he ought to have framed his suit accordingly. That equally applies to the present case.

Reference was also made to the *Collector of Monghyr* v. *Hardinarain Sahu* (3); *Hardinarain Sahu* v. *Ruderperkash Misser* (4). As to the rights of a mother on a partition, and as to the proportionate shares taken by the father and sons, questions subordinate to the main one, were cited, Mitakshara, Chap. I, s. 2, v. 8, and s. 5; Vivada Chintamoni, edit. Prosonno Kumar Tagore, 1863, p. 230; Colebrooke's Digest, books 5 and 6; Strange's Hindu Law, Chap. 9; Mayne's Hindu Law and Usage, Chap. XV.; *Mahabir Persad* v. *Ramyad Singh* (5).

Mr. *J. T. Woodroffe* and Mr. *C. W. Arathoon* for the respondents.—The estate has been treated as ancestral, but the circumstances under which Girdhari Singh obtained his share in Mouzah Lalpur Bhatkera might have to be considered on the question, whether it is ancestral, if it were raised: see *Mohabir Koer* v. *Joobha Singh* (6). The first, and main point is that the whole family estate is liable, because the debt, contracted for no immoral purpose, is due by the father of the family, living under the Mithila law, on this point identical with the Mitakshara. This supports the sale of the family estate in

(1) 6 Moore's I. A. 424.
(2) I. L. R., 3 Calc., 198; L. R., 4 I. A., 247.
(3) I. L. R., 5 Calc., 425. (4) I. L. R., 10 Calc., 626.
(5) 12 B. L. R., 90; 20 W. R. 192. (6) 8 B. L. R., 38; 16 W. R., 221.

satisfaction of the decree upon the father's debt. It may, however, be taken as a second ground, that the father here was manager of the family estate, and represented the sons' interests; the family, also, profited by the money, and had the temporary benefit of the rents and profits after the ouster. It has been found, moreover, by both Courts that the family estate was understood to be sold. The nature of the debt contracted by the father will govern the question what was liable to be sold, whether the whole, or only the father's share. The order for sale comprises the whole estate; but it is not the construction of the order, and of the written proceedings, that will determine the question. It is the general principle that a Hindu son is liable for his father's debt to the extent of the ancestral estate, which comes to the son, under the Mitakshara at his birth, and under the Dayabhaga at his father's death; provided always that the debt has not been contracted for an immoral purpose. Practically, the result of the decisions in Bengal, as to the effect of attachment of family property for sale in execution of a decree against the father, is much the same as in the other provinces. For Madras decisions see *Ponnappa Pillai* v. *Pappuvayyangar* (1), cited with approval by this Committee in *Muttayyan Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (2). In Bengal the principle which was declared in *Janak Kishour Koonwar* v. *Roghoonundun Singh* (3) by the Sadr Court in 1861, appears again in the judgment in *Hanuman Persad Panday* v. *Babooee Munraj Kooer* (4) and is declared in *Girdhari Lal* v. *Kantoo Lal* (5); and is, briefly, that exemption of the son's estate from liability for the father's debt is founded upon the nature of that debt.

The difference between the Bengal decisions and those of Madras and Bombay seems only to be that, according to the first, the son's interest in the family estate is *primâ facie* bound by a decree for debt against the father, although if the son has not been made a party to the suit, or proceedings against the father,

(1) I. L. R. 4 Mad., 1.
(2) I. L. R. 6 Mad., 1; L. R., 9 I. A., 128.
(3) S. D. A., 1861, p. 213.
(4) 6 Moore's I. A., 421. (5) L. R. 1 I. A., 321; 14 B. L. R., 187.

1885

NANOMI BABUASIN v. MODHUN MOHUN.

he may question the decree upon any ground upon which he could have contested it, if he had been joined; one ground being that the debt was incurred for an immoral purpose. The Courts in Madras have held that the son's share is always bound, unless he shows that the debt has been incurred for an immoral purpose. And in Bombay the same liability attaches to the son's estate, see the judgment of Westropp, C.J., in *Udaram Sitaram* v. *Rana Panduji* (1).

The decision in *Deendyal* v. *Jugdeep Narain Singh* (2), on which reliance is placed for the appellant's case, only in effect comes to this,—that whatever may be the distinction between the rights of a purchaser under a conveyance from a co-parcener, holding a share in joint property, and the rights of a purchaser at an execution sale of a co-parcener's rights, the purchaser, at a sale in execution of decree, acquires all the right to compel the same partition which the judgment-debtor might have compelled, if minded so to do, when he was situated as he was before the decree against him.

Upon the second ground, that the father being head of the family, and *karta*, may bind it; see *Deva Singh* v. *Ram Monohur* (3), *Ram Narain Lal* v. *Bhawani Prasad* (4), and these cases show that the interests of the rest of the family are not exempt from liability. It is the remedy of the sons that they may sue to prevent their father from wrongfully dealing with the estate; but they are not co-equal with him as regards authority to deal with others concerning it, and the father has authority over them. The father's position in his capacity of representative of the estate must be put on a level, as regards execution for debts due from the family, with that of a widow representing the family estate. For the effect of the sale of her right, title, and interest in execution of a decree, where she represents, not only her own interest for life, but the estate at large, see *Jugolkisor* v. *Jotindro Mohun Tagore* (5), and the *Court of Wards* v. *Maharaja Coomar Ramaput Singh* (6).

—(1) 11 Bom. H. C., 76.
(2) I. L. R. 3 Calc, 198; L. R. 4 I. A., 217.
(3) I. L. R. 2 All., 751. (4) I. L. R. 3 All., 443.
(5) I. L. R. 10 Calc., 985; L. R. 11 I. A., 66.
(6) 14 Moore's I. A., 605; 10 B. L. R., 294.

And the father, though the only person named in a transaction, may be shown to have acted as the representative of the family; see *Baso Koer* v. *Hurry Das* (1). The sale in this case was not merely of the personal interest of the father, but of his interest as representing the family. See W. H. Macnaghten's note to Case III in the Precedents; Principles and Precedents of Hindu Law, Chap. XI, of Sale, Case III.

Reference was also made to *Sheoprosad* v. *Jung Bahadur* (2); *Umbica Prosad Tewari* v. *Ram Sahai Lal* (3); *Laljee Sahi* v. *Fukeerchund* (4); *Mudden Gopal Lal* v. *Gowrunbutty* (5); *Ramblunjun Singh* v. *Mundur Kooer* (6); *Ram Nagra Singh* v. *Kishen Kishore Narain* (7).

Their Lordships having intimated that they would decide the main point first, without hearing the respondents upon the minor points before the former had been disposed of, Mr. *R. V. Doyne* replied.

On a subsequent day (December 18th) their Lordships' judgment was delivered by

LORD HOBHOUSE.—This is one of the cases, frequently occurring of late years, which raise questions as to the circumstances under which ancestral estate of a family subject to the Mitakshara law becomes liable to answer the debts of the head of the family.

This family is one governed by the Mithila law, which, on the point under consideration, does not differ from the Mitakshara. Its head was one Girdhari Singh. He had a wife, the appellant Nanomi Babuasin, and two sons, the other two appellants, who were born before the transactions which gave rise to this suit, and were minors when this suit was commenced. The family are, or were, possessed of valuable ancestral property in land.

In the year 1870 one Mrs. Collis, complaining that Girdhari had wrongfully ousted her from land held under lease from him, sued him to recover possession and mesne profits. The lease had been granted as part of an arrangement under which Girdhari took a loan of Rs. 45,000 from Mr. Collis, the predecessor

(1) I. L. R. 9 Calc., 495.
(2) I. L. R. 9 Calc., 389.
(3) I. L. R. 8 Calc., 898.
(4) I. L. R. 6 Calc., 135.
(5) 15 B. L. R. 264; 23 W. R., 365.
(6) 23 W. R., 127.
(7) 23 W. R., 266.

1885

NANOMI BABUASIN v. MODHUN MOHUN.

in title of Mrs. Collis. On the 10th April 1871 a decree was made according to the prayer of Mrs. Collis' plaint, and the sum of Rs. 32,318 was awarded to her for mesne profits.

On the 9th of September 1872 a portion of the family ancestral land was brought to sale by execution proceedings in satisfaction of the decree, and the respondent Hardi Narain became the purchaser. The property sold was described as "8 annas 11¼ gundas out of the entire 16 annas, the right and interest of the judgment-debtor in mouzah Rampur Bhatkera." The fraction mentioned was the share of the whole of Girdhari's joint family, the remaining annas and gundas belonging to some relatives who were separate in estate. A dispute arose as to the regularity of the sale, which led to further litigation; but in the result the sale was upheld and Hardi Narain took possession, which he still retains.

In September 1878 the present suit was brought by the appellants against Hardi Narain and Girdhari. They pray that either the sale to Hardi Narain may be wholly set aside, or that they may recover possession of the land, and that Hardi Narain may be put to take proceedings for partition. They contend, first, that nothing passed by the sale except such share as Girdhari would have taken on partition; and, secondly, that he would only have taken one-fourth part.

The Subordinate Judge of Bhagulpur agreed with the appellants on the first point, but differed on the second. He was of opinion that, by the Mithila law, the wife, having had a provision made for her, would take no share on partition, and that the father would take a double share. He therefore gave the appellants a decree for a moiety of the estates in suit. In deciding for the first contention, the Subordinate Judge founded himself on *Deendyal's case* (1). In his opinion, as Mrs. Collis sued Girdhari alone, she did not intend her decree to extend over the entire property of the joint family. And on the same grounds he construed the language used to describe the property in the execution proceedings as though it meant nothing more than the coparcenary interest of Girdhari.

(1) L. R., 4 I. A., 247; I. L. R., 3 Calc., 198.

1885

NANOMI BABUASIN v. MODHUN MOHUN.

Both parties appealed to the High Court, who were of opinion that the whole interest of the family passed to Hardi Narain by the sale, and ordered that the suit should be dismissed with costs. The Court considered that the interest which all parties believed that Hardi Narain was buying was the whole 8 annas 11 gundas into possession of which he was actually put. As regards *Deendyal's case*, they held that it does not lay down an invariable rule that in no case will the coparceners' interest pass in an execution sale unless they are joined in the suit. And they point out that in *Muddun Mohun's case* (1) a different rule was laid down; and that in *Suraj Bunsi's case* (2) a statement was made of the effect of the then decisions on the subject which embodied the principle of *Muddun Mohun's case*. The present appeal is brought from the decree of the High Court.

There is no question that considerable difficulty has been found in giving full effect to each of two principles of the Mitakshara law, one being that a son takes a present vested interest jointly with his father in ancestral estate, and the other that he is legally bound to pay his father's debts, not incurred for immoral purposes, to the extent of the property taken by him through his father. It is impossible to say that the decisions on this subject are on all points in harmony, either in India or here. But the discrepancies do not cover so wide a ground as was suggested during the argument in this case.

It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt, and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing that liability. Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority.

(1) L. R. 1 I. A., 321; 14 B. L. R., 187. (2) L. R. 6 I. A., 85; I. L. R. 5 Calc. 148.

1885

NANOMI BABUASIN v. MODHUN MOHUN.

The circumstances of the present case do not call for any inquiry as to the exact extent to which sons are precluded by a decree and execution proceedings against their father from calling into question the validity of the sale, on the ground that the debt which formed the foundation of it was incurred for immoral purposes, or was merely illusory and fictitious. Their Lordships do not think that the authority of *Deendyal's case* bound the Court to hold that nothing but Girdhari's coparcenary interest passed by the sale. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale. If the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's coparcenary interest alone (and in *Deendyal's case* there certainly was an ambiguity of that kind), the absence of the sons from the proceedings may be one material consideration. But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings.

That brings their Lordships to consider the nature of the debt in this case. There was a great deal of discussion whether the debt originated in the loan of Rs. 45,000, or in Girdhari's receipt of the mesne profits for which the decree was given. It appears to their Lordships that the new debt for which the decree was made is the foundation of the sale. But, whichever it was, they think the High Court are clearly right in holding that it must be taken as a joint family debt. The Subordinate Judge does not give any opinion on this point. If it is a joint family debt, a sale to answer it, effected either by Girdhari or in a suit against him, cannot be successfully impeached.

There remains only the question whether anything more than the father's coparcenary interest was bargained for, paid for, and taken

possession of by the purchaser. On this point, their Lordships are clearly of opinion that the High Court have decided rightly. Indeed the Subordinate Judge did not decide otherwise, so far as the facts go. As before mentioned, he held that only the coparcenary interest passed, because of the effect he ascribed to *Deendyal's case*. But he was clear that the language of the execution and sale proceedings was such that the purchaser must have thought that he was buying the entirety. It is equally clear that all parties thought the same.

The purchaser, therefore, has succeeded in showing that he bought the entirety of the estate, which could lawfully be sold to him, and the suit fails upon the merits. Their Lordships will humbly advise Her Majesty to dismiss this appeal, and the appellants must pay the costs.

Appeal dismissed with costs.

Solicitors for the appellants: Messrs. *Barrow & Rogers.*

Solicitor for the respondent, Modun Mohun: Mr. *T. L. Wilson.*

C. B.

SMALL CAUSE COURT REFERENCE.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Pigot and Mr. Justice Trevelyan.

1886

April 8.

WALLIS AND OTHERS (PLAINTIFFS) *v.* TAYLOR (DEFENDANT.)*

Small Cause Court Presidency Towns Act (XV of 1882), *s.* 18—*Jurisdiction—Army Act of* 1881 (41 & 45 *Vic, c.* 58), *ss.* 148, 151—*Leave to sue.*

The jurisdiction given to Small Cause Courts by Act XV of 1882 is not affected by 44 & 45 Vic., c. 58, s. 151.

THIS was a reference from the Calcutta Court of Small Causes.

The facts of the case were that the plaintiffs, who had obtained leave to sue under s. 18 of the Small Cause Court Act of 1882, brought a suit in the Calcutta Court of Small Causes against the defendant, who was a lieutenant in the 45th (Rattray's) Sikhs and who was then stationed at Quetta, to recover Rs. 320-15-9 for goods sold and delivered. It was admitted that there was a Court of Small Causes in Quetta.

* Small Cause Court Reference No. 4 of 1885, made by H. Millett, Esq., Chief Judge of the Court of Small Causes at Calcutta, dated the 2nd of May 1885.